

## REVIEW OF PUBLIC COMMENTS

**The U.S. Fish and Wildlife Service has reviewed and responded to public comments received during a public comment period of February 13 through April 13, 2004, for a tentative Annual Funding Agreement with the Council of Athabascan Tribal Governments to perform certain programs, functions, services, and activities on the Yukon Flats National Wildlife Refuge, Alaska.**

**SUMMARY:** In 2003-2004, the Alaska Region of the U.S. Fish and Wildlife Service (Service or we) negotiated a tentative annual funding agreement (AFA or Agreement) with the Council of Athabascan Tribal Governments (CATG) under the Tribal Self-Governance Act of 1994 (Public Law 103-413). The CATG is a qualified tribal consortium composed of Arctic Village, Beaver, Birch Creek, Canyon Village, Chalkyitsik, Circle, Gwichyaa Zhee Gwich'in Tribal Government of Fort Yukon, Rampart, Stevens Village, and Venetie. These are predominantly Athabascan Indian villages within the boundary or very near the Yukon Flats National Wildlife Refuge (Yukon Flats Refuge). The Yukon Flats Refuge is the third largest refuge within the National Wildlife Refuge System, administered by the Service.

The Agreement provides for CATG to perform certain programs, functions, services and activities (Activities) for the Yukon Flats Refuge during the one-year period of August 1, 2004, through July 31, 2005, for \$59,000. The Service initially announced a 45-day public comment period which began on February 13, 2004. However, during the public comment period the Service and other bureaus of the Department of the Interior (DOI) were disconnected from the Internet and lost their ability to receive e-mail messages from the public for a 9-day period. We then extended the public comment period an additional 15 days, to April 13, 2004.

This review and preparation of responses began during the public comment period and was completed on April 26, 2004. To respond to concerns expressed in the public comments, the Service and CATG re-negotiated some of the terms and wording of the Agreement during the week of April 19, 2004. A Decision Document on whether to sign the Agreement will be based partly on this public consultation. The Alaska Regional Director of the U.S. Fish and Wildlife Service will sign the Decision Document. If the decision is to sign the Agreement, it will be forwarded to the Secretary of the Interior for her acceptance and endorsement. If accepted by the Secretary, it will be forwarded to the United States Congress for review and to the Tribal Chiefs of CATG.

**FOR FURTHER INFORMATION:** The Agreement and project work descriptions, this review of public comment, and other information may be viewed at: 1) the Office of the Refuge Supervisor for Northern Alaska, Region 7, Alaska, U.S. Fish and Wildlife Service, 1011 East Tudor Road, Anchorage, Alaska 99503-6199; 2) the Yukon Flats National Wildlife Refuge headquarters, 101 12<sup>th</sup> Avenue, Room 264, Fairbanks, Alaska 99701; or 3) on the Internet at, <http://www.r7.fws.gov/media/catg/index.htm>.

## **SUPPLEMENTARY INFORMATION:**

### **How Did the Service Develop the Agreement?**

The negotiations between the Service and the CATG were carried out in accordance with the Code of Federal Regulations at 25 CFR Part 1000.

### **What Events Led to This Action?**

On June 16, 2003, the Service received a proposal, dated May 30, 2003, from CATG to assume some Activities at the Yukon Flats Refuge under the Indian Self-Determination and Education Assistance Act (P.L. 93-638), as amended by the Tribal Self-Governance Act, P.L. 103-413. The proposal asserted that in accordance with Section 403(c) of P.L. 93-638, as amended, the Activities were of geographic, historical, and cultural significance to CATG and its member Tribes.

The parties first met on August 19, 2003, in a pre-negotiation meeting. As a result of that meeting CATG modified the proposal. The two parties agreed at the August 19 meeting that the federally mandated 10-day Service response time would begin following receipt of the modified proposal. According to the regulations implementing P.L. 93-638, the agency must provide a reply within 10 days of the pre-negotiation meeting, explaining whether or not an Activity is available for negotiation. The Service received the modified proposal on August 29, 2003. On September 5, 2003, the Service sent a response to CATG indicating that eight listed Activities were available to be included in an AFA because they were not inherently federal functions, and they were of geographic and cultural significance to the tribes that make up CATG. The parties agreed to begin official negotiations on September 28, 2003. After this first meeting, the two parties continued to negotiate specifics of the AFA and reached this Agreement in late December 2003.

The regulations allow for a public consultation process. The public was officially notified of a tentative Agreement in a public notice on February 13, 2004. The Service called the Agreement tentative because it declined to sign the Agreement until after a public consultation process. The notice was published in newspapers and posted on the Service's Alaska Region website. The notice stated that we would accept public comments for 45 days. Subsequently, we extended the comment period for an additional 15 days, which placed the last day to postmark comments on April 13, 2004. We extended the comment period for two reasons. First, on March 15, 2004, the Service's Internet and e-mail capabilities were disconnected due to a court order affecting several bureaus within the DOI. The public had been invited to submit comments to the Service via e-mail, and to read the tentative Agreement on the Service website. Nine days later, on March 24, 2004, our Internet and e-mail capabilities were re-established as allowed by a subsequent court order. The second reason to extend the comment period was based upon requests by multiple members of the public who requested an extension of the public comment period to 90 days.

### **What is the Tribal Self-Governance Act?**

The Tribal Self-Governance Act of 1994 was enacted as an amendment to P.L. 93-638 and incorporated as Title IV of that Act. The Self-Governance Act allows identified self-governance tribes with the opportunity to request AFAs with the Bureau of Indian Affairs (BIA) and non-BIA agencies within DOI. When dealing with non-BIA agencies, including the Service,

identified tribes may enter into funding agreements that would allow them to conduct certain Activities of such non-BIA agencies. Eligible Activities include Indian programs (programs created for the benefit of Indians due to their special status as Indians); Activities otherwise available to Indian tribes (any Activity that a federal agency might otherwise contract to outside entities); and Activities that have a special geographic, historical, or cultural significance to an Indian tribe. The P. L. 93-638 and the regulations that implement the law (25 CFR Part 1000.129) prohibit the inclusion of Activities in an AFA that are “inherently federal functions.”

The Refuge has no special Indian programs. All Activities of the Service on national wildlife refuges are for the benefit of the fish and wildlife resources, their habitats, and the American public. Activities that may have a special relationship with a tribe are the most promising for inclusion in an AFA. Whether to enter into an agreement with a tribe for these Activities is discretionary on the part of the Service. The Service recognizes that most members of CATG live within the boundary of the Yukon Flats Refuge or very close to it, have used the lands and resources of the Yukon Flats Refuge for most of their lives, as did their ancestors, and therefore feel very much a part of these lands.

### **What Happens Now?**

The Service will prepare a Decision Document. If the Alaska Regional Director decides the Service should sign the Agreement, he will say so in the Decision Document and notify CATG and the Secretary of the Interior. Once both parties have signed the Agreement, the regulations (25 CFR 1000.177) provide that the Secretary will forward the Agreement to both the House Resources Committee, Office of Native American and Insular Affairs, and the Senate Committee on Indian Affairs. If there are no objections to the Agreement, it would go into effect 90 days after it is submitted to Congress.

### **Summary of Public Involvement**

The Service announced the public comment period on February 13, 2004, by placing public notices in the principle daily newspapers in Anchorage, Fairbanks, and Juneau, Alaska. A joint Service-CATG news release was sent to Alaska media offices. The public notice, the news release, the Agreement with project work descriptions, and a series of questions and answers were posted on the Service’s Alaska website. When the Service’s access to the Internet and e-mail was stopped by court order, we placed announcements in the above newspapers and mailed an announcement to 77 parties who had commented earlier or who we knew were interested in the draft Agreement. The announcements stated that we could no longer receive comments by e-mail and requested comments be sent by mail or facsimile. This announcement also discussed the extension of the public comment period to 60 days. We held public meetings in Fairbanks and Anchorage on March 15 and 18, 2004, respectively. Separate newspaper advertisements announced these meetings.

### **Nature of Public Comments**

We received 147 public comments in a variety of ways. Several individuals submitted more than one comment. We received 63 letters by either mail or facsimile (or both), addressed to President George W. Bush, Secretary of the Interior Gale A. Norton, Regional Director Rowan Gould, Refuge Manager Ted Heuer, Assistant Refuge Manager Jimmy Fox, Refuge Supervisor Jerry Stroebele, or other government officials. We received 66 different e-mail messages (often addressed to several recipients), including over 40 e-mail messages from one

individual. At the Fairbanks public meeting, eight people made public statements. Seven people made statements at the Anchorage public meeting. All statements at the public meetings were recorded. Two individuals called Refuge Manager Ted Heuer during the official comment period and made statements over the telephone. One individual visited refuge headquarters to discuss the tentative Agreement and convey his concerns. Verbal comments were documented and added to the public record. Some comments were received before the formal notice of a public comment period, and a few were received following the public comment period. All comments were reviewed and placed in the public record.

We received one letter of comment from the Alaska State Legislature. We received two comments from the Alaska Department of Fish and Game. We received 18 comments from organizations. We received 11 comments from Indian Tribes, Tribal entities, or other Native American organizations, groups, or corporations. We received 118 comments from individuals.

The preponderance of comments recommended against the Service signing the Agreement; 126 comments did not support the Agreement as written. These comments ranged from outright opposition to support with specific modifications. We received 21 comments supporting the Agreement unconditionally. The Response to Public Comments below, summarizes and/or characterizes comments and attempts to respond collectively. Applicable quotes are provided in italics.

## **Response to Public Comments**

**Issue 1. Length of the Public Comment Period and Number of Public Meetings.** Twenty-one respondents urged that we extend the public comment period to 90 days and/or also hold public meetings in Juneau, Washington D.C., and Missoula, Montana.

*“The Service should extend the public comment period to 90 days and hold meetings in Juneau, Alaska, Washington D.C., and Missoula, Montana.”*

**Response:** The Service initially planned a 30-day public comment period, consistent with most other Service public comment periods for actions on national wildlife refuges in Alaska. However, we decided to provide for a 45-day public comment period because we were aware of the public interest in, and controversy over, negotiations between the Service and the Confederated Salish-Kootenai Tribes in Montana. After we announced the 45-day public comment period, we later extended the public comment period to 60 days, based on: 1) public comments that recommended an extension of the public comment period; and 2) a court-ordered shutdown of DOI internet access which lasted for 9 days, disrupting the Service’s ability to receive comments by e-mail, and the ability of the public to review the Agreement on the Service’s website. If it had not been for the interruption of our e-mail and Internet, we would have waited longer in the 45-day comment period to decide whether to extend the comment period, and if so, for how long.

We placed public notices in newspapers in Anchorage, Fairbanks, and Juneau announcing the extension of the public comment period, and providing information on where, when, and how additional information could be obtained and public comments could be submitted. As we neared the end of the 60-day public comment period we had received comments from all of the

conservation groups and other organizations that had expressed interest in this issue or had previously contacted us with questions. Given the brevity of the Agreement and supporting documents, the limited funding amount involved, the small number of public comments received, and the relatively low turnout for the public meetings in Fairbanks and Anchorage, the Service did not believe that another extension of the public comment period and additional public meetings were necessary or would be beneficial.

Many of the comments we received addressed both the Agreement with CATG and the current negotiations between the Service and the Confederated Salish-Kootenai Tribes in Montana, concerning Activities at the National Bison Range. The National Bison Range is also a national wildlife refuge in the National Wildlife Refuge System. We provided copies of all of these comments to Service officials in Montana and the Service's Region 6 headquarters office in Denver. We decided that a public meeting to discuss the Agreement for Activities at the Yukon Flats Refuge in Alaska, if held in Missoula, Montana, would generate public interest and questions more specifically applicable to the National Bison Range, but of little applicability to the Yukon Flats Refuge Agreement.

**Issue 2. Preparation of an Environmental Impact Statement.** Twenty-six respondents requested that the Service prepare an Environmental Impact Statement (EIS) on the Agreement.

*"The Service should prepare an Environmental Impact Statement on this tentative annual funding agreement."*

*"Please hold four public hearings, extend the comment period to 90 days and conduct an EIS."*

*"This proposed contract appears innocuous, but if approved, may have great detrimental impacts upon the conservation, management, protection and use by the public of the nation's natural resources and the agencies with Congressional responsibility for them. The AFA, if approved, with this potential, becomes a significant federal action and should require an EIS and full NEPA compliance."*

**Response:** In response to these comments, we reviewed DOI policy on compliance with the National Environmental Policy Act. The determination to proceed or not to proceed with this Agreement is an administrative decision. The Service does not believe the Agreement is a major federal action that will result in significant environmental impacts. The Service considers the work that is identified in the Agreement to be part of the routine operations, maintenance, and management of the Yukon Flats Refuge (whether done by Service employees, CATG employees, or another contractor). The Service has found that routine operation, maintenance, and management activities do not (individually or cumulatively) have a significant effect on the human environment and are, therefore, categorically excluded from National Environmental Policy Act compliance (Part 516 of the Departmental Manual, Chapter 6).

The Service did complete a comprehensive conservation plan/environmental impact statement/wilderness review of the Yukon Flats National Wildlife Refuge in October 1987. This plan and EIS provide overall management direction and guidance for the Refuge. The Activities identified in the Agreement with CATG are not different from the management activities addressed in the refuge comprehensive conservation plan. Management of 17(b) easements,

environmental education, data collection and research, wildlife management, and subsistence management and monitoring are all addressed in the 1987 comprehensive conservation plan/EIS.

Departmental Policy, 516 DM 2, does require NEPA documentation if the proposed action: *establishes a precedent for future action or represents a decision in principle about future actions with potentially significant environmental effects*. Because the Service is retaining all responsibility and authority for managing the Refuge, and the refuge manager is responsible for following existing laws, regulations, Service policies, and plans for management of the Refuge, we do not envision any adverse environmental impacts will result from this proposed action.

**Issue 3: Cooperation with Local Residents.** A number of respondents supported the Service's efforts to work more cooperatively with Yukon Flats residents. Several people offered that local residents would have a better understanding and appreciation for the work of the Service if they were involved in the day-to-day activities of the Refuge.

*"We applaud the Service for working more closely with locals living within the refuge. Local involvement in refuge management activities will enhance understanding and support of the refuge and its mission."*

**Response:** The Agreement is the result of months of discussions with one main goal in mind: adhere to our responsibilities as mandated in various laws, regulations, and policies. For instance, P.L. 93-638 obligates a Department of the Interior agency to recognize a tribe's right to negotiate for an annual funding agreement. The Compact of Self-Governance between the CATG and the United States of America (Compact) and the Service's Native American Policy dictate that the Service is to cooperate in a government-to-government relationship with Indian tribes. We are also legally bound by the purposes of the Yukon Flats National Wildlife Refuge and other management requirements set forth in the Alaska National Interest Lands Conservation Act (P.L. 96-487), which established the Refuge. We administer and manage the Refuge for all Americans in accordance with the National Wildlife Refuge System Administration Act (16 USC 668dd et seq.), as amended, and the implementing regulations and policies of that Act.

**Issue 4: Support for the Agreement.** Twenty-one comments expressed unconditional support for the Agreement. Their reasons varied, but a number of different points were made, including:

*"... will help develop alternative economies that are not based on non-renewable resource extraction; local involvement will enhance understanding of and support for natural resource protection; excellent idea to utilize local residents and resources to improve upon the already great work being done on the Refuge; important for the refuge to develop a high level of rapport and cooperative management with Athabascan residents living within the refuge boundaries; maintains United States interests while involving CATG in culturally significant matters to CATG member villages; positive achievement in the Federal government's trust responsibility to tribes; CATG has the capability to do the job; greater local involvement can benefit resource management; local harvest surveys have proven to be the most effective approach for obtaining accurate harvest information; will help the young people in the villages see that having a refuge in their neighborhood is a good thing; it will provide the communities with a sense of being able to have a say in what goes on in their areas and what goes on with the resources; will provide an opportunity for local tribal residents to share traditional knowledge."*

An additional 12 comments were supportive of the Agreement in concept, but believed the language should be modified to clarify certain issues.

*“We are pleased the agreement reserves ultimate responsibility and authority of Yukon Flats Refuge to the Service; defines work products; does not fund or transfer positions; is limited in duration; and is on an annual basis with option of amendments or termination.”*

**Response:** We negotiated an agreement that follows three key documents: P.L. 93-638, the Compact, and the National Wildlife Refuge System Administration Act (as amended). This is the first AFA in the history of the Service, and we had no Service examples to follow; however, we did utilize the framework of an existing AFA we obtained from the National Park Service. After careful review of public comments, we re-negotiated with CATG and modified the Agreement to clarify several issues. This document notes those changes.

**Issue 5: This Agreement will set a bad Precedent for National Wildlife Refuges and National Parks.** Thirty-seven comments, while sometimes applauding the Service and CATG for their efforts to work together more cooperatively, were very concerned about the precedent this Agreement would set for other national wildlife refuges, national parks, national monuments, national historic sites, federal water projects, etc. Several comments were opposed to the Agreement because of this precedent.

*“This annual funding agreement will set a bad precedent for national parks and refuges.”*

*“I am afraid the precedent this agreement will set will destroy the National Wildlife Refuge System as we know it even though the duties in the agreement seem minor.”*

*“It is a grave mistake to privatize and localize national refuges, national parks, national forests and anything federal simply to give contracts away to some local or regional government, private company, or individual.”*

*“This agreement will help destroy the National Wildlife Refuge System as we know it.”*

*“The world’s most successful wildlife conservation system will be dismantled if these Indian Self-Determination and Education (Assistance) Act agreements really get going.”*

**Response:** We are very aware that this Agreement will set an example for the National Wildlife Refuge System. We believe that this Agreement, as currently amended to address some of the concerns raised by the public, sets a good standard for the National Wildlife Refuge System and is consistent with all applicable laws and regulations regarding Tribal Self Governance and the National Wildlife Refuge System. It should also be noted that this is not the first “Non-BIA” annual funding agreement for DOI programs “of special geographic, historical, or cultural significance to participating Tribes” (25 CFR Subpart F). The National Park Service has had an annual funding agreement with the Grand Portage Band of Lake Superior Chippewa Indians, for maintenance work at the Grand Portage National Monument in Minnesota, for several years. We recognize that, particularly in Alaska where Native Americans are still largely dependent on fish, wildlife, and plants on national wildlife refuges, a strong and continuing cooperative effort must



be nurtured and maintained between Service employees and tribal members. This Agreement is one of many tools available to us to further cooperation. We would very carefully exercise our discretion in entering this Agreement and negotiating any future agreements with Tribes.

**Issue 6. Competitive Contracting Would be Better.** Many comments suggested that competitive contracts would make more efficient use of limited refuge budgets and would be a more equitable way of doing business.

*“Currently, the Refuge System suffers from a \$2 billion operations and maintenance funding backlog, which, if the current rate of funding continues, will never be eliminated. Because of this, refuges struggle to meet even their most basic wildlife conservation objectives. In fact, funding shortfalls have led to the decline of refuge habitats and wildlife populations, aging facilities and infrastructure and the cancellation of many refuge public use programs. Even more troubling, more than 1/3 of the nation’s 542 refuges do not have any staff, and nearly half do not have a staff biologist. With such a crippling budget situation facing the NWRS and no funding relief expected in the near future, the FWS must manage the System in the most cost-effective, efficient manner possible. An important way for the FWS to contain costs on contracted services is through the process of competitive bidding. Annual funding agreements drafted under Public Law 93-638 preclude such a process.”*

*“The influx of contractor positions into NWRS (the National Wildlife Refuge System) will also aggravate current operations and maintenance backlogs. As you know, there never have been clear delineations of tasks on NWRSs (national wildlife refuges). Because of historic under-funding and under-staffing, administrators lead tours, ORP’s (Outdoor Recreation Planners) create budgets, administrative assistants drive tractors, and maintenance mechanics do everything that DoD (Department of Defense) facilities would require fifteen different job titles.”*

*“The Service should use competitive contract(s) to accomplish the work proposed in the tentative annual funding agreement.”*

**Response:** The Service has, and will continue to use, competitive contracts where appropriate. However, the law and DOI regulations (25 CFR 1000.122-126) implementing Tribal Self-Governance, allow Tribes to formally request negotiations for AFAs for “programs, functions, services, and activities” of “special geographic, historical, or cultural significance” to the Tribe. The ten Tribes which compose CATG have a special geographical and cultural relationship to the lands and resources within the refuge boundaries. The law and regulations provide a preference for these types of programs, and provide the agency discretion to award the AFAs on a non-competitive basis. It would not have been appropriate for the Service to enter good faith negotiations with CATG (as was required by the regulations), reach this Agreement, and then decide to award the same work through a competitive process.

We believe that the dollar amounts awarded to CATG through this annual funding agreement are fair and reasonable for the work being performed, whether being done by CATG or another contractor. Because: 1) CATG’s office and employees are located within the boundaries of the



Refuge, and 2) logistical costs would be very high for any individual or business outside of the Yukon Flats, it is unlikely another contractor could do this same work as cost effectively as CATG.

Federal conservation agency budgets, including the Service's budget, are forecast to decline in the next several years. For this reason, successor AFAs with CATG in future years, and any agreements requested by other Tribes for national wildlife refuges, will continue to be subject to a high bar test for efficiency and cost-effectiveness.

**Issue 7: Request That we do not use P.L. 93-638 Authority to Contract.** One comment emphasized that the Service has the discretion to enter an AFA and urged us to enter a different contracting arrangement.

*"The record and public comments related to the proposed contract seem to indicate that FWS is 'compelled' to enter into this contract, . . . FWS has discretionary authority to enter into 638 contracts for these kinds of Refuge activities and the CATG contract must contain express reference to the purely discretionary nature of this authority. . . it would be better for FWS to enter into an agreement using non-638 authority."*

**Response:** We agree that the Service has complete discretion to enter into this Agreement. We have received requests and formal proposals from the CATG and other Tribes, for several years, to negotiate agreements under provisions of P.L. 93-638. Until 2003 we declined to enter AFAs for several reasons. During this same period, however, the Service has contracted with CATG for work under other contract authorities. We have seen CATG build their capacity for this type of work and increase their expertise. Because CATG has agreed to perform the Activities under the terms that were mutually agreed upon, we choose to enter this P.L. 93-638 AFA with the hope and expectation that increased cooperation and coordination with the Tribes will follow.

**Issue 8: Question about the Service's Authority to Enter this Agreement.** One comment questioned whether the Service has the authority to enter into this Agreement and cited Section 5 of the National Wildlife Refuge System Improvement Act of 1997.

*"We also note that the 1997 Act imposes limitations on the scope of FWS's contract authority. . . Congress ultimately chose to limit this authority to 'agreements with State fish and wildlife agencies.' See section 5."*

**Response:** Section 5 of the Act does provide for the Service *"to enter into cooperative agreements with State fish and wildlife agencies for the management of programs on a refuge."* However, the Act does not limit the authority of the Service to enter into other contracts or agreements for work on national wildlife refuges, as allowed by other federal laws. It is also important to note that we are not entering into a cooperative agreement (or AFA) for CATG to "manage" programs of the refuge. We are retaining all of our refuge management responsibilities and authorities.

**Issue 9: Concerns About Tribes' Sovereign Immunity.** Ten comments expressed concern that if CATG has sovereign immunity there would be no way for the government to get money back if the work is not completed satisfactorily. Two comments were concerning legal recourse should a member of the public be accidentally injured by a CATG employee working under this Agreement.

*"The Service should not enter an annual funding agreement with Tribes that have sovereign immunity."*

*"The CATG contract needs to contain a waiver of sovereign immunity by the tribes to ensure that the public that uses the Refuge is not denied ordinary legal protections in the case of accidents that may cause injury or death."*

*"The Senate and House Majorities maintain that there are no separate sovereign governments in Alaska possessing sovereign immunity. Our views are consistent with those of the Alaska Congressional delegation that neither the Department of the Interior nor Congress has listed or ratified Alaska's Native villages as federally recognized Indian tribes that possess governmental powers of sovereign immunity. Nevertheless, since you propose to entertain a "government-to-government" relationship with the contracting parties, several questions arise."*

*"First, it is unclear from the text of the agreement who specifically is the "government" with whom the United States is proposing to contract. CATG is a private organization of member groups. A recent Alaska Supreme Court opinion indicates that even if member groups are deemed to be "tribes," the organization composed of those member groups is not. Does the United States intend to treat CATG as a tribal government itself? If so, why would the United States not mandate that the contracting party and its "tribal" member affiliates waive any perceived immunity under the agreement? Without such a waiver, consequences could be severe for Alaskans. As legislators, it is our sworn obligation to protect the interests of the Alaska citizenry. Should someone be harmed economically or physically during the execution of this agreement, that person could be left without a meaningful private remedy under the terms of the proposal (excluding coverage under the Federal Tort Claims Act)."*

**Response:** The CATG does not have sovereign immunity. The member tribes of CATG are federally recognized Indian Tribes; however, CATG has no governmental status. The CATG is a nonprofit tribal organization as defined in P.L. 93-638. The CATG is not immune to legal action. Although CATG does not have sovereign immunity, its member tribes do. However, members of the public who might be injured as a result of actions by a CATG employee have legal recourse against CATG, and also to the U.S. Government under the Federal Tort Claims Act (as recognized in the last statement above).

**Issue 10: The Service Should not pay CATG "Up-Front."** Several comments thought it was a bad business practice to give a contractor all of the money up-front.

*"The Service should not give the CATG the entire project funding at the beginning of the agreement period."*

**Response:** The “Compact of Self-Governance” entered into by the Secretary of the Interior and the Council of Athabascan Tribal Governments on October 1, 1999, specifically states, *“For each fiscal year covered by an AFA negotiated under this Compact, the Secretary shall pay the funds specified for that fiscal year under the AFA by paying the total amount provided for in the AFA in one advance lump sum payment to the extent applicable.”* The Service is working with the member Tribes of CATG in a government-to-government relationship under P.L. 93-638. Normal government contracting regulations do not apply to that Act.

If the federal government “reassumes” programs from a Tribe (or consortium like CATG), based on a finding of imminent jeopardy to a physical trust asset, a natural resource, or public health and safety, then under 25 CFR 100.315, *“the Tribe/Consortium must repay funds to the Department as soon as practical after the effective date of the reassumption.”*

**Issue 11: Concerns That the Agreement Could Limit Visitor Access.** A few comments expressed concern about the potential of this Agreement to have an adverse impact on their ability to access or use refuge lands.

*“This agreement could limit visitor access to the Refuge.”*

**Response:** This Agreement will not affect whom, when, or where the public can use the refuge for hunting, fishing, wildlife observation, photography, environmental education, interpretation, or other uses. It will not affect the management direction for the Refuge, which was defined with substantial public input through the refuge comprehensive conservation planning process. The Refuge comprehensive conservation plan was approved and adopted in 1987.

We do hope that the Agreement will improve the public’s ability to access refuge lands through the identification and marking of public access easements across Native corporation lands within the refuge boundary. It is a federal responsibility to mark these easements. Similar programs have been underway on other national wildlife refuges in Alaska for several years.

**Issue 12: Waiver of Regulations.** Several comments objected to provisions in the Compact [Section 14 (b)] and the Agreement [Section 8. C.] that allow CATG to request a waiver of any DOI regulation CATG believes presents an obstacle to carrying out the Agreement. There was also concern expressed about the wording in the Compact, which states that a request for a waiver of regulations can be denied, *“only upon a specific finding by the Secretary that identified language in the regulation may not be waived because such waiver is prohibited by federal law.”*

*“The CATG should not be able to request specific regulation waivers.”*

**Response:** The regulation waiver provision in the Compact [Section 14(b)(ii)] is qualified with the clause, *“Until such time as regulations are promulgated . . . .”* The Compact was signed on October 19, 1999. The regulations currently in effect at 25 CFR Part 1000 became effective on January 16, 2001, and codified the waiver provisions which are now different and more comprehensive than in the Compact. In 25 CFR 1000.225, for a non-Title I eligible Activity (such as those covered by this Agreement) the Secretary may deny a waiver request if it is:

*(b)(1) Prohibited by Federal law; or*

*(b)(2) Inconsistent with the express provisions of the AFA.*

In 25 CFR 1000.222, the Tribe must submit a written request for a waiver from the appropriate bureau director for non-BIA programs. So, the Tribe would have to address the request to the Director of the Service. The Director would consult with the Alaska Region in reviewing this request. The request could not be granted if it is prohibited by federal law or is inconsistent with the Agreement.

**Issue 13: Federal Management Responsibility.** Many comments were concerned about the Service turning over “management responsibilities” to a tribe, and some felt that all programs, functions, services, and activities of the National Wildlife Refuge System are inherently federal.

*“Can there be any question as to the inherent federal responsibility for managing programs, services, functions, or activities on National Wildlife Refuges?”*

*“Sections 7B and 8B of the tentative agreement could be interpreted to suggest of co-management, which is inconsistent with section 7A and federal law. Sections 7B and 8B should be revised to state, ‘the refuge manager will, in close collaboration [or coordination] with CATG, set priorities’ and ‘set forth specific standards,’ respectively.”*

**Response to first comment:** Refuge System laws make it quite clear that the responsibility and authority for the administration and management of the National Wildlife Refuge System lies with the Service. We thought this was clear in the Agreement, but in response to this concern, and after re-negotiation with CATG, we changed the wording under Section 7 A. (FWS Direction and Control) as follows: (Italics are added to the sentences in this Review only, to highlight the change.)

From:

“A. *Refuge Manager*. Under this AFA, the Refuge Manager will retain *ultimate* responsibility and authority for directing and controlling the *operation* at the Yukon Flats NWR.”

To:

“A. *Refuge Manager*. Under this AFA, the Refuge Manager will retain *all* responsibility and authority for directing and controlling the *administration, management, and operations* at the Yukon Flats NWR.”

The Service is not giving away any management responsibilities or authorities under this Agreement. We are cognizant of our public and resource management responsibilities. In this Agreement we have included only Activities that we believe will benefit the Refuge, the public, and CATG.

We agree that there are “inherently federal functions” involved in managing a national wildlife refuge. However, we do not claim that all work that takes place on a national wildlife refuge is inherently federal and needs to be performed by Service employees. We often rely on contractors, universities, other agencies, and volunteers to provide some of our aircraft and/or

logistical support, data collection (including harvest data) and analysis, education and outreach, maintenance of equipment, printing, fire suppression, etc.

**Response to Second Comment:** We did not make any changes based on this comment. The negotiation process set the priorities and the standards of the Agreement. If we decide that priorities or standards must be revised during the execution of the Agreement, we will re-negotiate for those revisions, in order to include them in a cost-effective manner. In this way the Agreement is like a contract. If we want to change we may have to pay.

**Issue 14: Reference to Laws Affecting National Wildlife Refuges.** One comment noted that the Agreement did not refer to the National Wildlife Refuge System Improvement Act.

*“The Yukon Flats unit is governed by the provisions of the 1997 National Wildlife Refuge Improvement Act (P.L. 105-57) and the Alaska National Interest Lands Conservation Act (ANILCA) (P.L. 96-487). There are absolutely no references to these statutes in the proposed contract. The contract must be modified to include express reference to these laws to ensure that all activities by CATG are consistent with these fundamental Refuge statutes.”*

**Response:** The Agreement does refer to the Alaska National Interest Lands Conservation Act in Section 4 under the definition of the Yukon Flats National Wildlife Refuge. We agree there should be a reference to the National Wildlife Refuge System Improvement Act in the Agreement, and have included it and the National Wildlife Refuge Administration Act in Section 4. (Note, the “Improvement Act of 1997” amended the “Administration Act of 1966.”)

**Issue 15: Replacing Qualified Service Personnel.** Several comments expressed concern that this Agreement, and others that may follow, will replace “*many current dedicated, well-trained Fish and Wildlife personnel*” with less qualified individuals.

*“This agreement will replace trained, professional Service employees.”*

*“I will continue to speak against any attempt to turn critical federal jobs related to our wildlife habitat lands over to any type of contractor.”*

**Response:** This Agreement will not lead to the loss of existing Service employees. Employees will neither be replaced nor will their duties be diminished under this Agreement. We view this Agreement as an expansion of the refuge’s existing programs and services to the public. However, we have said during negotiations with CATG that whenever there is a vacancy in an existing refuge position in Fairbanks (due to retirement, voluntary reassignment, or merit promotion), we will look at the duties performed by that position to see if some of the work could be efficiently performed by CATG. If feasible and cost efficient, we may then restructure the duties of the vacant position. This would likely be complex, because other personnel management issues are often at play in position management, and because in Fairbanks the three Refuge headquarters of the Yukon Flats, Kanuti, and Arctic Refuges share some staff for some duties. While we have encouraged CATG to build natural resource management capacity, we have also made it clear that we will not reassign existing Refuge employees to free up new work for CATG.

The Service also maintains a Student Career Experience Program where graduating student employees are reassigned to vacant refuge positions. These students have career-conditional employment status and have priority for placement. Most of them have advanced degrees in biology or natural resource management. The Service in Alaska has successfully used this program to recruit, train, and permanently hire several Alaska Natives and will continue to place a priority on this training program.

**Issue 16: The CATG Personnel Should Meet Certified Wildlife Biologist Standards.** One comment stated that CATG personnel performing biological investigations should be certified wildlife biologists.

*“To assure the qualifications of (CATG) personnel they should meet requirements of The Wildlife Society’s Certified Wildlife Biologist standards.”*

**Response:** The Office of Personnel Management sets standards of required college or other training coursework for specialized professional job series. The OPM does not require applicants to meet the standards set by The Wildlife Society for an individual to meet their Certified Wildlife Biologist classification. The CATG Liaison for the project, Eastern Yukon Flats Moose Population Estimation Survey, included in the Agreement, is a wildlife biologist and former employee of the Alaska Department of Fish and Game. Work to be performed under this project requires knowledge of wildlife management practices in general and of moose management specifically. The CATG Liaison has that knowledge and experience. Some of the work requires exceptional low-level piloting skills and a good safety record. There are some charter pilots available in Alaska that meet these requirements who are also routinely contracted by the Service and the Alaska Department of Fish and Game.

Some of this work only requires the skill to spot moose out of an airplane, to determine individual characteristics of the moose observed from a turning airplane, and to keep good records. This particular project grew out of earlier programs where local residents with good game spotting skills were employed as volunteer aerial observers to: 1) utilize their skills, and 2) provide credibility with local people for the results of the agencies’ moose surveys and census.

**Issue 17. The Service Should Hire Alaska Natives.** One comment suggested we use the local hire authority granted under provisions of Section 1308 of the Alaska National Interest Lands Conservation Act. The Act provides for hiring of any individual, who by reason of having lived or worked in or near a conservation system unit, has special knowledge or expertise concerning the natural or cultural resources of such unit. The law provides that individuals with these attributes shall be considered for any position within the unit, without regard to any provision of the civil service laws or regulations that require minimum periods of formal training or experience (and other provisions).

*“What surprised us most is your ability to provide jobs through your local hire authority, which is not being viewed as an option in lieu of this complicated precedent setting agreement . . . You should simply hire Alaska Natives to do the work and provide the services you pay for.”*

**Response:** The Service routinely reviews new or vacant positions on refuges in Alaska for consideration of recruitment under the local hire provisions of ANILCA. However, recruiting Alaska Natives under other hiring authorities can often be more advantageous to the individual by allowing better career mobility options. Currently the refuge employs two Alaska Natives hired under the ANILCA local hire program, and one other Alaska Native hired through the Student Career Experience Program. The Service aggressively seeks to diversify its workforce through recruitment outreach efforts and the use of all available hiring regulations and programs. The Activities included in this Agreement require various skills that any one individual may not have. Under the Agreement, the CATG can assign the work to the appropriate existing employee.

**Issue 18: Concern About a Conflict of Interest.** Two comments expressed concern that the Agreement creates an appearance of, or the potential for, conflict of interest because CATG members have actively pursued wildlife harvest allocation decisions that benefit their interests.

*“This proposed contract creates an arrangement in which key wildlife data will be collected by an interested party rather than a disinterested party. FWS needs to assure, through appropriate contract provisions and oversight, that the data collected are sound and can be relied upon by all parties.”*

*“Historically, management decisions have been vested in third party governmental bodies, specifically designed to avoid conflicts of interest. In this case, the very people affected by management decisions will be heavily involved in those decisions, including the establishment of seasons and bag limits. While we impute no ill motive to the individuals engaged in this contract, it has always been better to avoid the appearance of conflict whenever possible. Yet the proposed arrangement may very well lead to future conflict or the appearance of conflict.”*

**Response:** The wildlife harvest information will be collected according to protocols developed by the Federal Office of Subsistence Management, the Service’s Migratory Bird Management Office, and by the Subsistence Division of the Alaska Department of Fish and Game. These offices have found that engaging local people to collect this information leads to better information than can be obtained by agency personnel. The harvest reporting is done by household, rather than by individual hunters and is more accurate. The information reported cannot be traced back to the individual hunter. This encourages honest reporting.

The moose population survey in this Agreement is a continuation of an existing program that has been, and will continue to be, well coordinated with the Service and the Alaska Department of Fish and Game. Usually these agencies are conducting similar surveys in adjacent areas at the same time. Information obtained from these surveys will be used in making management decisions. That is the purpose of the surveys. The CATG, or members of CATG, will likely comment on proposals affecting seasons, bag limits, and harvest allocations for the moose population of the surveyed area. However, due to the open, collaborative public processes used by the Federal Subsistence Board and the Alaska Board of Game in making management decisions, and the collaborative and cooperative manner in which the moose surveys are conducted, we are not concerned that CATG’s participation in surveys would result in either



inaccurate information before the Boards or in undue influence on their decisions. We do not believe the issue would constitute a conflict of interest. On the other hand, a positive result will be providing more credibility to agency information and the Boards' actions to the local residents.

**Issue 19: Concern About Study Design and Approval.** This comment from the Alaska Department of Fish and Game expressed concern that the survey designs lack sufficient detail and the proper involvement of the Department in management of resident wildlife in Alaska.

*"We are concerned that the terms of the contract lack sufficient detail about the design and conduct of the moose surveys and the household harvest surveys. It is important that any data collected that will be used in management and allocation decisions be conducted under the design and approval of the Alaska Department of Fish and Game."*

**Response:** Upon receipt of this letter from the Alaska Department of Fish and Game we discussed this issue with the Deputy Commissioner and believe we resolved their concerns. The Service acknowledges that both the Alaska Department of Fish and Game and the Service share a mutual concern for fish and wildlife resources and their habitats, and both are engaged in extensive fish and wildlife conservation, management, and protection programs in Alaska. We desire to develop and maintain a cooperative relationship that will be in the best interests of both agencies, the concerned fish and wildlife resources and their habitats, and produce the best public benefits.

We would not enter this Agreement with CATG, or negotiate future agreements, where specific wildlife management work was not accomplished by qualified individuals or according to recognized wildlife management techniques and procedures acceptable to both the Service and the Alaska Department of Fish and Game. The work to be performed in the projects, Eastern Yukon Flats Moose Population Estimation Survey and Wildlife Harvest Data Collection, has been, and will continue to be, extensively coordinated with the Alaska Department of Fish and Game. These projects are designed and will be conducted according to established and acceptable procedures. The results of Activities performed by the CATG must be acceptable to, and useable in, management and allocation decisions by the Service, the Alaska Department of Fish and Game, the State Board of Game, and the Federal Subsistence Board. Because the information obtained from these projects will be subject to close scrutiny by these entities and by the general public, both the Service and CATG are aware that unacceptable results could jeopardize inclusion of this work in future agreements.

**Issue 20: Public Review of Amendments to the Agreement.** A number of comments expressed belief that the public should be able to review all proposed changes to an active agreement.

*"The Service should modify Sections 6 and 11 to allow for public review before additional activities are added to the agreement. Section 18 should be revised to make clear that the public will have the opportunity to review and comment on any expansion, modification, amendment or renewal of the agreement before the Service and CATG make a final decision."*

**Response:** As a result of this comment, in Region 7, Alaska, we will be guided by the following operational standards for public notice when negotiating amendments or successor agreements. If during the course of this Agreement, the Service and CATG negotiate an amendment to the 2004-2005 Agreement which does not materially change the type of work to be done, or does not increase the funding level by more than 25 percent, we will not notify the public until after the fact. If we propose to amend the 2004-2005 Agreement by more than 25 percent of the funding level or materially change the work, we will first notify the public with a minimum 15-day public comment period. If we negotiate a successor agreement for 2005-2006 that materially changes the work to be done and/or exceeds the 2004-2005 Agreement amount by more than 25 percent, we will notify the public and have a minimum 30-day public comment period. If, over time or through negotiation, we have substantially increased the cost of successor agreements, we would consider changing the percentages discussed here.

We are hopeful of a long-term, successful relationship with CATG and fully expect to negotiate successor agreements. We do not agree that Sections 6 and 11 need to be modified to provide for public notice. The existing regulations at 25 CFR Subpart I – Public Consultation Process, Part 1000.210-.214, provide for that.

**Issue 21: Moose Harvest Information Should be Reported Monthly.** One comment suggested that the specifications for the Wildlife Harvest Data Collection include a requirement for monthly reporting of moose harvests in the deliverables section.

*“Moose harvest reports should be received monthly.”*

**Response:** Originally, this was addressed in the timeline section of the proposal. We have moved the requirement to the deliverables section, and it now reads, *“A monthly report will be prepared that summarizes the moose harvested in each village. In addition, a summary will be prepared annually for all species on which harvest data has been collected. The summary will be reported to the FWS Liaison via phone, fax, or e-mail. The February 28<sup>th</sup> report will also include a summary of the moose harvested from August 25, 2004, to February 28, 2005. The report formats will follow CATG Technical Document 03-02.”*

**Issue 22: Random Surveys may be Required.** One comment also suggested random sampling of a subset of larger communities should be considered as a cost savings measure to ensure success of the survey.

*“The harvest survey section of the agreement should be amended by adding the option of surveying a random number of villages.”*

**Response:** To address this comment we have inserted the following two sentences in the second paragraph of the “Procedures” section: *“If budget constraints limit the ability to survey 100% of Yukon Flats village households, for the Village of Fort Yukon only, a subset of households may be sampled. In this instance 50-75% of the households would be randomly selected for survey and the results will be extrapolated to represent the Fort Yukon harvest.”*

**Issue 23: Concern That the Refuge Would be Managed for Native Americans.** Three comments expressed their concern that the Agreement would subordinate the purposes of refuge management to the benefit of the Tribe.

*“The Service should not be managing the Refuge solely for Native Americans.”*

*“We would ask why Congress would create situations that would compromise the number one important reason of preserving wildlife to a subordinate position in order to benefit the tribes.”*

**Response:** The Yukon Flats National Wildlife Refuge and other national wildlife refuges have always been, and will continue to be, managed for all Americans -- present and future generations. The Agreement would allow some of the work of the Service on the refuge to be accomplished by CATG. However, the refuge manager will retain all responsibility and authority for management and decision-making. The rights of the American public to use the refuge will not be diminished in any manner.

**Issue 24: Section 403(k) Precludes this Agreement.** One comment suggested that the Service and the Department have downplayed Section 403(k) of the Tribal Self-Governance Act.

*“During Congressional hearings on the Act in 1994, the International Association of Game and Fish Agencies, in a move that could now be omniscient persuaded Senator John McCain to insert so-called “Disclaimer K” into the Act. Fearing that compacts with some native programs could threaten a number of joint and/or cooperative programs between state agencies and federal agencies (especially USFWS), Section 403(K) specifically exempts “inherently federal” programs, services, functions, and activities from compacting in AFA’s. During the past 18 months, the Secretary and Director have emphasized Section 403(c) as operative law, and have essentially ignored 403(K) of the Act.”*

**Response:** We reviewed the applicable sections of the law and consulted with our attorney to ensure that our actions were correct. Here are the applicable sections of the law:

*Section 403(k) Disclaimer.--Nothing in this section is intended or shall be construed to expand or alter existing statutory authorities in the Secretary so as to authorize the Secretary to enter into any agreement under sections 403(b)(2) and 405(c)(1) with respect to functions that are inherently Federal or where the statute establishing the existing program does not authorize the type of participation sought by the tribe: Provided, however an Indian tribe or tribes need not be identified in the authorizing statute in order for a program or element of a program to be included in a compact under section 403(b)(2).*

Section 403(b)(2) states: *(b) Contents.—Each funding agreement shall—*

*(2) subject to such terms as may be negotiated, authorize the tribe to plan, conduct, consolidate, and administer programs, services, functions, and activities, or portions thereof, administered by the Department of the Interior, other than through the Bureau of Indian Affairs, that are otherwise available to Indian tribes or Indians, as identified in section 405(c), except that nothing in this subsection may be construed to provide any tribe with a preference with respect to the opportunity of the tribe to administer programs, services, functions, and activities, or portions thereof, unless such preference is otherwise provided for by law:*

Section 405 (c) states: *Report on Non-BIA Programs.--(1) In order to optimize opportunities for including non-Bureau of Indian Affairs programs, services, functions, and activities, or portions thereof, in agreement with tribes participating in Self-Governance under this title, the Secretary shall—*

*(A) review all programs, services, functions, and activities, or portions thereof, administered by the Department of the Interior, other than through the Bureau of Indian Affairs, without regard to the agency or offense concerned; and*

*(B) not later than 90 days after the date of enactment of this title, provide to the appropriate committees of Congress a list of all such programs, services, functions, and activities, or portions thereof, that the Secretary determines, with concurrence of tribes participating in Self-Governance under this title, are eligible for inclusion in such agreements at the request of a participating Indian tribe.*

The list of eligible programs, services, functions, and activities required by Section 405(c) was last published in the Federal Register, Volume 67, No. 66, Friday, April 5, 2002, Page 16434. *"Some elements of the following programs may be eligible for inclusion in a self-governance annual funding agreement. . . . This listing is not all-inclusive but is representative of the types of programs which may be eligible for tribal participation through an annual funding agreement."*

For purposes of this review, we list below only those programs or elements listed in the *Federal Register* which are similar to those included in this Agreement.

1. *Subsistence Programs within Alaska*
2. *Fish & Wildlife Technical Assistance, Restoration, & Conservation:*
  - a. *Fish & wildlife population surveys*
  - b. *Habitat surveys*
  - e. *Fish & wildlife program planning*
4. *Education Programs:*
  - a. *Interpretation*
  - b. *Outdoor classrooms*
9. *National Wildlife Refuge Operations & Maintenance*
  - a. *Construction*
  - d. *Maintenance*
  - f. *Biological program efforts*

The Agreement covers the following Activities only: 1) wildlife harvest data collection; 2) moose surveys; 3) environmental education and outreach; and 4) locating and marking trails on private lands within the refuge boundary where the Government retained an easement under provisions of Section 17(b) of the Alaska Native Claims Settlement Act of 1971. [The lands on which these easements are located are privately owned by Native village corporations and Native regional corporations. The easements provide for legal access by the public across (and limited camping on) the private lands in order to access the public lands beyond.] The Agreement does not give up any inherently federal responsibilities for budget allocation, planning, decision-making, assignment of priorities, or any other over-arching government responsibility for these Activities. The Service has retained the management responsibility for these Activities.

**Effective Date:**

According to 25 CFR Section 1000.177(a) and (b), *“After all parties have signed the AFA, a copy is sent to the Tribe/Consortium. The Secretary forwards copies of the agreement to: (1) The House Subcommittee on Native Americans and Insular Affairs; and (2) The Senate Committee on Indian Affairs.”*

The work formerly performed by the House Subcommittee on Native Americans and Insular Affairs, when the regulations were written, is now performed by the Office of Native American and Insular Affairs of the House Resources Committee. If the Agreement is signed, it will become effective not earlier than 90 days after the Secretary of the Interior submits it to the Congressional committees.

**Statutory Authority:**

We derive our authority to enter this Agreement from the National Wildlife Refuge System Administration Act, as amended (16 USC 668dd et seq.), Section 403(c) of the Indian Self-Determination Education and Assistance Act, P.L. 93-638, as amended by the Tribal Self-Governance Act of 1994, P.L. 103-413, and in accordance with the Compact of Self-Governance negotiated and agreed to by CATG and the Secretary under Title IV of P.L. 93-638, as amended dated October 1, 1999.

**Preparers:**

The following individuals read the public comments and prepared this response: Ted Heuer, Refuge Manager, Yukon Flats National Wildlife Refuge, Fairbanks, Alaska; Jimmy Fox, Assistant Refuge Manager, Yukon Flats National Wildlife Refuge, Fairbanks, Alaska; and Jerry Stroebele, Refuge Supervisor, Region 7 Regional Office, Anchorage, Alaska. This document was reviewed by Todd Logan, Regional Chief of the National Wildlife Refuge System-Alaska; and Joseph Darnell, Attorney, Office of the Regional Solicitor, DOI, Anchorage, Alaska. The document was prepared for Rowan Gould, Regional Director, Region 7, Alaska, of the U.S. Fish and Wildlife Service; and for the public. Our address is 1011 East Tudor Road, Anchorage, Alaska 99503-6199. Our telephone number is (907) 786-3354; fax (907) 786-3998.

April 26, 2004